[ORAL ARGUMENT NOT SCHEDULED]

No. 19-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re DONALD J. TRUMP, in his official capacity
as President of the United States,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS PENDING MANDAMUS

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INTRODUCTION AND SUMMARY OF ARGUMENT

In this extraordinary case, individual Members of Congress have brought suit directly under the Constitution against the President of the United States for alleged violations of the Foreign Emoluments Clause. The Members' complaint rests on a host of novel and flawed constitutional premises—including an assertion of legislator standing that is flatly foreclosed by a Supreme Court decision issued last month—and litigating the claims would entail intrusive discovery into the President's personal financial affairs on account of his federal office. Despite this remarkable complaint, the district court treated this case as a run-of-the-mill commercial dispute. Not only did it deny the President's motion to dismiss, but it refused even to certify for immediate appeal under 28 U.S.C. § 1292(b) its orders denying dismissal: without disputing that there are substantial legal grounds for disagreeing with its refusal to dismiss the case, the court simply held that an interlocutory appeal would not materially advance the termination of the litigation because it intended to provide for an expeditious schedule of discovery and summary judgment briefing. In so ruling, the court ignored the unique separation-of-powers concerns posed by discovery in a case against the President in his official capacity.

Pursuant to 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21, the government respectfully requests that this Court issue a writ of mandamus directing the district court to dismiss the complaint outright or, at a minimum, to certify for interlocutory appeal pursuant to section 1292(b) the court's September 28, 2018, and

April 30, 2019, orders denying the President's motion to dismiss. In addition, the government respectfully requests that this Court promptly stay district-court proceedings pending disposition of this petition, as the Fourth Circuit has done in a parallel case, *In re Trump*, No. 18-2486 (4th Cir. Dec. 20, 2018).

A party seeking mandamus must demonstrate that it has a "clear and indisputable" right, there are "no other adequate means" of relief, and the writ is otherwise "appropriate under the circumstances." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). Each of those requirements is easily satisfied in this case.

The district court's failure to dismiss the complaint for lack of Article III standing was clear and indisputable legal error. The Supreme Court held in *Raines v. Byrd*, 521 U.S. 811 (1997), that federal legislators generally lack Article III standing to sue to enforce the asserted institutional interests of Congress. Since then, neither that Court nor this one has found standing on the part of Congress, much less individual Members, to sue the Executive. And just last month, the Supreme Court held in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), that one branch of a state legislature lacked standing to appeal a federal court's invalidation of a state law governing redistricting even though it affected the legislature's own composition; the Court reasoned that, where the interest asserted is shared by the entire legislature, Article III requires at a minimum that any suit be brought by the legislature itself—not an amalgam of individual legislators or even a single chamber of a bicameral body.

Assuming Article III would permit a suit by the legislative branch at all, that principle applies here *a fortiori*: a minority of Members of Congress clearly lack standing to vindicate an alleged interest in the President's compliance with the Foreign Emoluments Clause that is based merely on the ability of Congress as a whole to provide consent for the President's acceptance of otherwise-prohibited Emoluments. Indeed, the district court ignored *Bethune-Hill* even though the government promptly brought that decision to its attention while the motion for section 1292(b) certification was pending.

Equally indefensible was the district court's decision to infer a novel equitable cause of action to enforce the Foreign Emoluments Clause against the President of the United States. Judicially inferring a cause of action that goes beyond traditional equitable practice is a "significant step under separation-of-powers principles," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017), because "Congress is in a much better position than [the courts] to . . . design the appropriate remedy" for a legal injury, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). That is particularly true when a plaintiff seeks to infer an equitable cause of action directly against the President, who is not subject to suit in his official capacity even under statutory causes of action absent an "express statement by Congress," given his unique position in our constitutional structure. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). And all the more so because the plaintiffs here are legislators who lack cognizable interests protected by the Clause, which imposes a prophylactic

requirement to prevent foreign corruption of official action. The district court's contrary holding that the President may be subject to an injunction or declaratory judgment at the behest of the Members improperly minimized all of these separation-of-powers concerns.

The district court also clearly erred in interpreting the Foreign Emoluments Clause. Below, the President explained that the text, structure, and history of the Constitution's Emoluments Clauses demonstrate that the term "Emolument" therein refers only to compensation accepted from a foreign or domestic government for services rendered by an officer in either an official capacity or employment-type relationship. The district court's contrary construction of the term "Emolument," which would broadly encompass any "profit, gain, or advantage," renders parts of the constitutional text superfluous and is contradicted by unbroken executive practice from the Founding era to modern times. On mandamus, this Court need not resolve this merits issue given the obvious threshold defects with the Members' suit. But the district court's interpretive error underscores that this suit is fatally flawed.

Mandamus is appropriate in these circumstances to correct such fundamental errors. The President has no other adequate means of obtaining relief. If the district court's clearly erroneous orders are allowed to stand, this improper suit will proceed and the Members will commence discovery aimed at probing the President's personal financial affairs because he holds federal office. Indeed, that discovery, the Members acknowledge, may be directed at the President himself, "distract[ing] [him] from the

energetic performance of [his] constitutional duties." *Cheney*, 542 U.S. at 382. As the Supreme Court has stressed, the "high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Id.* at 385 (alteration in original). And that is particularly true where, as here, the discovery that the Members envision seeks to end-run the process of seeking information if there is a legitimate legislative interest, through a congressional subpoena. Mandamus is appropriate in light of these separation-of-powers concerns with the requested discovery and the indisputable futility of the underlying suit.

For essentially the same reasons, the government also requests that the Court promptly stay further district-court proceedings pending consideration of this mandamus petition. The Members have already propounded thirty-seven subpoenas to third parties. Those requests require a response by July 29, 2019, and the government respectfully requests that, by July 22, 2019, this Court grant a stay of proceedings, as the Fourth Circuit has done in a parallel Emoluments suit.

STATEMENT

A. The Foreign Emoluments Clause provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. Although not directly at issue here, the Domestic

Emoluments Clause provides that "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." *Id.* art. II, § 1, cl. 7.

B. Plaintiffs are 215 Members of Congress who sued the President in his official capacity on June 14, 2017. The Members allege that, "[s]ince taking office, [the President] has accepted, or necessarily will accept, numerous emoluments from foreign states." Add. 138, 172 (Second Am. Compl. ¶¶ 1, 77). They allege that the President owns hundreds of businesses in the United States and in at least twenty foreign countries, and that he violates the Foreign Emoluments Clause whenever such businesses receive "any monetary or nonmonetary benefit . . . from a foreign state without first obtaining 'the Consent of the Congress.'" Add. 139, 155 (Second Am. Compl. ¶¶ 6, 34). The Members assert that these alleged violations injure them because they are denied an "opportunity to cast a binding vote that gives or withholds their 'Consent' before the President . . . accepts a foreign 'Emolument.'" Add. 171-72 (Second Am. Compl. ¶ 76). They seek a declaration that the President has violated the Foreign Emoluments Clause and an injunction prohibiting him from accepting foreign Emoluments without first obtaining congressional consent. Add. 175-76 (Second Am. Compl. 57-58).

C. The government moved to dismiss the Members' complaint for lack of jurisdiction and for failure to state a claim on which relief could be granted. The district court bifurcated its motion-to-dismiss proceedings. On September 28, 2018, it held that the Members had Article III standing to bring this suit. Add. 4. It reasoned that legislators have standing to allege that their votes have been "completely nullified," Add. 17 (quoting *Raines*, 521 U.S. at 823), and that the Members' votes were so nullified due to the President's alleged acceptance of "prohibited foreign emoluments as though Congress had provided its consent," Add. 32. The government promptly moved to certify an interlocutory appeal of that order on October 22, 2018.

On April 30, 2019, the district court denied the remainder of the motion to dismiss. Add. 59. As to the Members' cause of action, the court held that it is proper to imply a right of action to protect any "right[] safeguarded by the Constitution unless there is a reason not to do so." Add. 99 (quotation marks omitted). The court further rejected the government's argument that relief was unavailable directly against the President, concluding that an injunction could properly be entered against the President because compliance with the Emoluments Clauses is a mere "ministerial duty." Add. 105. The court also determined that the Members fall within the Foreign Emoluments Clause's zone of interests because "the only way the Clause can achieve its purpose" is if Congress is permitted to vote on the receipt of Emoluments. Add. 100. As to the meaning of the Foreign Emoluments Clause, the district court ruled

that the term "Emolument" meant any "profit, gain, or advantage," a definition that encompassed the Members' factual allegations. Add. 94. The government moved to certify an interlocutory appeal of that order on May 14, 2019.

On June 25, 2019, the district court denied certification of its two orders. Add. 107. The court reasoned only that, because the issues in this case could "be resolved on cross motions for summary judgment" after expeditious discovery and summary-judgment briefing, the government did not satisfy section 1292(b)'s requirement that interlocutory appeal "materially advance the ultimate termination of the litigation." Add. 112-16 (quoting 28 U.S.C. § 1292(b)). The court did not dispute the existence under section 1292 of multiple "controlling" questions as to which there is, at the very least, "substantial ground for difference of opinion." Indeed, the court did not address at all the relative merits of its orders denying the government's motion to dismiss.

D. The Members' pre-discovery statement makes clear that they may seek what they assert will be "limited" discovery from the President. Dkt. No. 75, at 2-3. That discovery may include attempts to obtain "the President's financial documents." *Id.* at 3. Moreover, while the Members assert that they "plan to focus discovery" on third parties, even that discovery would concern the financial interests of the President on account of his office, in order to "determine whether President Trump is currently receiving funds" from his business enterprises attributable to proceeds from foreign governmental customers. *Id.* at 2-3.

On June 25, the district court entered a discovery schedule contemplating three months of fact discovery. To date, the Members have propounded thirty-seven third-party subpoenas. The subpoena recipients are required to respond by July 29, 2019.

ARGUMENT

An appellate court has the power under 28 U.S.C. § 1651(a) to issue a writ of mandamus directing the conduct of a district court where (1) the petitioner has a "clear and indisputable" right to relief; (2) there are "no other adequate means to attain the relief"; and (3) mandamus relief is otherwise "appropriate under the circumstances." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). Although the standard for mandamus is, and should be, a high one, it is satisfied in the extraordinary circumstances presented here.

I. THE PRESIDENT HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF.

A. The district court's standing holding was clearly and indisputably incorrect.

1. In *Raines v. Byrd*, 521 U.S. 811 (1997), six Members of Congress who had unsuccessfully opposed the Line Item Veto Act brought suit following its enactment seeking to declare the Act unconstitutional. *Id.* at 814-16. The *Raines* plaintiffs contended that the Act had injured them by "alter[ing] the legal and practical effect of [their] votes" and "divest[ing] [them] of their constitutional role in the repeal of legislation." *Id.* at 816. The Supreme Court held that the plaintiff legislators lacked a judicially cognizable injury under Article III. *Id.* at 818, 829-30. After noting that the

Members had not asserted any "*personal injury*"—that is, harm suffered in a "private capacity"—the Court explained that the Members' institutional injury was not judicially cognizable. *Id.* at 818-19, 821.

Most important to that institutional-injury analysis, the Court emphasized the absence of any "historical practice" supporting the legislators' suit. *Raines*, 521 U.S. at 826. "It is evident from several episodes in our history," the Court observed, "that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Id.* The fact that past Congresses and Presidents never resorted to the courts to resolve these and other inter-branch disputes underscored that the *Raines* plaintiffs' suit was not one "traditionally thought to be capable of resolution through the judicial process." *Id.* at 819.

Raines also noted two other factors militating against the plaintiffs' standing. First, the Court "attach[ed] some importance to the fact that [the plaintiffs] have not been authorized to represent their respective Houses of Congress in this action." 521 U.S. at 829. The Court observed that Congress's powers are "not vested in any one individual, but in the aggregate of the members who compose the body," *id.* at 829 n.10, and reaffirmed that "[g]enerally speaking, members of collegial bodies do not have standing to [take litigative actions] the body itself has declined to take," *id.* Second, the Court highlighted that the plaintiffs had "adequate remed[ies]" through the legislative process that would entirely address their injuries, provided that they

could persuade a majority of their colleagues to agree. *Id.* at 829. For instance, Congress could "repeal the Act or exempt appropriations bills from its reach." *Id.*

After *Raines*, this Court has twice rejected claims of standing by federal legislators. *See Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). On both occasions, this Court reaffirmed that *Raines* generally forecloses such suits, and emphasized the narrowness of any possible exception. *Campbell*, 203 F.3d at 20-22; *Chenoweth*, 181 F.3d at 113-14. This Court also emphasized that *Raines* abrogated its prior precedent on legislative standing. *Chenoweth*, 181 F.3d at 113-15.

In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court applied *Raines* to hold that one chamber of Virginia's bicameral legislature lacked standing to appeal to defend a state redistricting plan affecting the composition of the legislature itself. *Id.* at 1952-55. The Virginia House of Delegates argued that it had standing because Virginia's constitution allocates the authority to establish "electoral districts" to "the General Assembly." *Id.* at 1953. But the Court rejected that argument, explaining that "the House constitutes only a part" of the General Assembly, and so lacked standing to sue regardless of whether the Assembly itself could establish a cognizable injury. *Id.* "Just as individual members lack standing to assert the institutional interests of a legislature," the Court concluded, "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature

as a whole," such as the alleged interest in drawing the electoral maps that would determine its own composition. *Id.* at 1953-54 (citing *Raines*, 521 U.S. at 829).

Finally, it warrants emphasis that the specific limitations on legislative standing in *Raines* and *Bethune-Hill* reflect the fundamental rationale of Article III standing. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

2. The lack of Article III standing in this case follows a fortiori from *Bethune-Hill* for three reasons. *First*, *individual Members* of the House and Senate necessarily "lack standing to assert the institutional interests" of "the Congress" as they cannot even assert any interests of their respective Chambers. *See Bethune-Hill*, 139 S. Ct. at 1953 (citing *Raines*, 521 U.S. at 829). *Second*, the separation-of-powers concerns that counseled against standing in *Bethune-Hill* are even stronger for *federal* legislators, because the Constitution itself vests "enforcement powers" concerning compliance with federal law in the Executive, not the Legislative, branch. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Raines*, 521 U.S. at 824 n.8. And *third*, the asserted legislative interest in whether or not to pass a law consenting to a foreign "Emolument" is weaker than the Virginia House's asserted interest in *Bethune-Hill* concerning a redistricting law that directly affected its own composition. *See* 139 S. Ct. at 1953.

Indeed, the implications of plaintiffs' theory of standing only underscore its inadequacy, particularly after *Bethune-Hill*. For example, the Members' professed interest in whether Congress should consent to prohibited Emoluments would perversely imply that Congress *has* standing to enforce the Foreign Emoluments Clause but *lacks* standing to enforce the Domestic Emoluments Clause because the latter prohibition is absolute rather than qualified by congressional consent. And it would also mean that one House of Congress has standing to enforce against sovereign States—or the other chamber of Congress—the numerous constitutional provisions that require the consent of Congress. *E.g.*, U.S. Const. art. I, § 5, cl. 4 (adjournment of a House of Congress); *id.* § 10, cl. 2 (imposts or duties); *id.* § 10, cl. 3 (duties of tonnage and interstate compacts). Those propositions are plainly untenable, and the case should end with *Bethune-Hill*, which the district court ignored even though the government brought that recent decision to its attention while the section 1292(b) motion was pending.

Moreover, even setting aside *Bethune-Hill*'s square holding that individual legislators cannot sue to enforce alleged institutional interests of their legislature as a whole, the Members' suit fails. *Raines* and its progeny refute the existence of any judicially cognizable legislative interest in compliance with the Foreign Emoluments Clause by the President or other federal officers.

Most fundamentally, the district court made little effort to square its conclusion with the lack of historical support for Article III adjudication of interbranch political

disputes. *See Raines*, 521 U.S. at 826-29. Neither the Members nor the court ever identified an analogous confrontation that was adjudicated in federal court. *See Chenoweth*, 181 F.3d at 113-14 ("Historically, political disputes between Members of the Legislative and Executive Branches were resolved without resort to the courts."). And contrary to the district court's assertion (Add. 53), the type of dispute implicated here is not new: Members of Congress frequently clash with the Executive on whether Congress's consent is constitutionally necessary before the President's taking particular actions. *See, e.g.*, *Campbell*, 203 F.3d at 20; *Chenoweth*, 181 F.3d at 113. That the merits of those disputes have never culminated in adjudication by courts demonstrates that such interbranch disputes are not "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819. Otherwise, Members of Congress could sue every time the President or his subordinates—by Executive Order, agency rulemaking, or other executive action—allegedly circumscribe Congress's institutional role of providing "consent" for federal action that the Executive lacks authority to take unilaterally. *But see id.* at 826 (no standing to allege "the abstract dilution of institutional legislative power").

The district court likewise disregarded the additional factors that the *Raines* Court found relevant. The district court never reckoned with the fact that the Members have not been "authorized to represent their respective Houses of Congress in this action," *Raines*, 521 U.S. at 829, and that they have not been and could not have been authorized to represent the United States itself, *compare Bethune-Hill*, 139 S.

Ct. at 1952 (noting that Virginia "could have authorized the House to litigate on the State's behalf"), *with Buckley*, 424 U.S. at 138. The district court's conclusion that "a single Member of Congress could have standing to sue based on a vote nullification theory when it was the President's action, rather than a lack of legislative support, that nullified the Member's vote," Add. 33, is impossible to square with this Court's holdings in *Campbell* and *Chenoweth*, where it *was* the President's actions that caused the Members' alleged injuries. *E.g.*, *Campbell*, 203 F.3d at 20 ("Appellants claim that the President . . . failed to end U.S. involvement in the hostilities after 60 days.").

Similarly, the district court's suggestion that, unlike in *Raines*, 521 U.S. at 829, the Members lack legislative remedies as an alternative to suit is untenable. Congress, unlike members of the public, has access to various "self-help" remedies uniquely available to legislators. *Campbell*, 203 F.3d at 24; *see United States v. Windsor*, 570 U.S. 744, 791 (2013) (Scalia, J., dissenting) (noting that Congress has "available innumerable ways to compel executive action without a lawsuit"); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 319 (D.C. Cir. 1988) ("[T]he most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives."). Among other powers, Congress can withhold funds from the Executive, decline to enact legislation that the Executive desires, or enact and override vetoes of legislation that the Executive disfavors—including on the subject of Emoluments. The availability of such political remedies reinforces the wisdom of Article III's "barrier against congressional legal challenges to executive action."

Campbell, 203 F.3d at 21; *see id.* at 24 ("*Raines* explicitly rejected [the] argument that legislators should not be required to turn to politics instead of the courts for their remedy."). Using these remedies, Congress may force the Executive to comply with its view of the law. But Congress "must care enough to act against the" Executive Branch itself, "not merely enough to instruct its lawyers to ask [the courts] to do so," let alone outside counsel for a minority of Members. *See Windsor*, 570 U.S. at 791 (Scalia, J., dissenting).

Finally, the district court misunderstood a possible narrow exception identified in *Raines*. The Court there noted that it had only ever "upheld standing for legislators (albeit *state* legislators) claiming an institutional injury" in "one case." *Raines*, 521 U.S. at 821. In that case, *Coleman v. Miller*, 307 U.S. 433 (1939), a group of state legislators brought suit in state court contending that their votes in the legislature, which would have been dispositive to reject a proposed federal constitutional amendment, had been "completely nullified" through an improper voting procedure that ratified the amendment. *Raines*, 521 U.S. at 823. *Raines* explained that *Coleman* stands—"at most"—for "the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id.* Subsequently, this Court emphasized that this "very narrow possible *Coleman* exception to *Raines*" is satisfied only in circumstances where the plaintiff legislators "could [not] have done anything to reverse" the

outcome of the challenged legislative vote. *Campbell*, 203 F.3d at 22-23; *see Bethune-Hill*, 139 S. Ct. at 1954 (limiting *Coleman* to "the results of a legislative chamber's poll or the validity of any counted or uncounted vote.").

The Members' attempt to fit this case into any *Coleman* exception fails at multiple levels. To begin, *Coleman*—a case involving state legislators—does not apply to claims brought by Members of Congress. Even before *Raines*, this Court recognized that "[a] separation of powers issue arises as soon as the *Coleman* holding is extended to United States legislators," because "[i]f a federal court decides a case brought by a United States legislator, it risks interfering with the proper affairs of a coequal branch." *Harrington v. Bush*, 553 F.2d 190, 205 n.67 (D.C. Cir. 1977). In light of "the separation-of-powers concerns present[ed]," the Supreme Court in *Raines* expressly reserved the question whether *Coleman* could be extended to a suit "brought by federal legislators." 521 U.S. at 824 n.8. And this Court has not applied that decision post-*Raines* to allow federal legislators to litigate institutional claims of injury (even assuming arguendo that *Coleman* might not be limited to state legislators). Recently, the Supreme Court reiterated that "a suit between Congress and the President would raise separation-of-powers concerns absent" in a case applying *Coleman* to a claim by a state Legislature. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015); *see also Bethune-Hill*, 139 S. Ct. at 1959 (Alito, J., dissenting) (noting that "[a]n interest asserted by a Member of

Congress or by one or both Houses of Congress" may not be "consistent with the structure created by the Federal Constitution").

Moreover, even assuming *Coleman* could be extended to the federal context, the Members' claim here in no way resembles the claim in *Coleman*. The Members here do not allege that their "votes have been completely nullified" such that their "votes would have been sufficient to defeat (or enact) a specific legislative Act" and yet the "legislative action [went] into effect (or [did] not go into effect)" despite their votes. *Raines*, 521 U.S. at 823; *see also Bethune-Hill*, 139 S. Ct. at 1954 (reiterating that *Coleman* applies, "at most," in that specific context). Indeed, the Members do not even allege that their votes would be sufficient to approve or disapprove of the President's alleged receipt of Emoluments. And unlike the ratification of a proposed constitutional amendment at issue in *Coleman*, the injuries alleged by the Members here are hardly irrevocable through future legislative action. *See Campbell*, 203 F.3d at 23 (stating that "the very narrow possible *Coleman* exception to *Raines*" applies only where a plaintiff legislator "ha[s] no legislative remedy").

In all events, even assuming that this suit asserting legislative injuries somehow falls with a gap left open by *Raines*, it is unequivocally foreclosed by *Bethune-Hill* because it is brought by a minority of Members rather than Congress as a whole. Because the President is clearly and indisputably entitled to dismissal of the Members' suit for lack of Article III standing, a writ of mandamus is appropriate.

B. The district court's cause-of-action holding was clearly and indisputably incorrect.

1. Neither the Constitution nor any statute provides an express cause of action for alleged violations of the Foreign Emoluments Clause. And the Supreme Court has cautioned that the creation of a "judge-made remedy" of an implied cause of action in equity is available only in "some circumstances" that present "a proper case." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (federal equity jurisdiction is limited to historical practices of the English Court of Chancery). Inferring a cause of action that extends beyond "traditional equitable powers" is a "significant step under separation-of-powers principles" because it intrudes upon "Congress, [which] has a substantial responsibility to determine" whether a suit should lie against individual officers and employees. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017).

Implied equitable claims against government officers have typically involved suits that "permit potential defendants in legal actions to raise in equity a defense available at law." *Michigan Corrs. Org. v. Michigan Dep't of Corrs.*, 774 F.3d 895, 906 (6th Cir. 2014); *see, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Such suits ordinarily do not pose separation-of-powers concerns because they merely shift the timing and posture of litigating a legal question that Congress has already authorized to be adjudicated in federal court.

Here, by contrast, the district court barely paused in creating an equitable cause of action even though the Members "are not subject to or threatened with any enforcement proceeding" and even though the parties' dispute otherwise would not be in federal court *at all*. *See Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting). The Members' attempt to wield the Constitution "as a cause-of-action-creating *sword*" poses significant separation-of-powers concerns. *Michigan Corrs. Org.*, 774 F.3d at 906. The district court believed it could create a cause of action because the Supreme Court has permitted a suit in equity to enjoin a violation of the Appointments Clause. Add. 98. But the relevant precedent allowed such a suit where a "formal investigation" had been threatened against one of the plaintiffs' private businesses. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010). The Members here have not alleged any such investigation, nor any other analogous harm to their property or person warranting invocation of equitable remedies. That crucial difference places *Free Enterprise Fund* squarely within the precedents discussed above, and this case squarely outside of them.

2. This is a particularly inappropriate context to recognize a non-traditional equitable claim because there is neither a proper defendant nor a proper plaintiff.

a. No equitable relief is available against the President in his official capacity. As the Supreme Court has explained, imposing such relief would violate the fundamental principle, rooted in the separation of powers, that federal courts have

"no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1867); *see Franklin v. Massachusetts*, 505 U.S. 788, 802-03, 806 (1992) (plurality op.). As this Court has explained, "for the President to 'be ordered to perform particular executive . . . acts at the behest of the Judiciary,' at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (citation omitted; alteration in original). And this Court has further noted that "similar considerations" govern claims for declaratory relief against the President. *Id.* at 976 n.1; *see Newdow v. Roberts*, 603 F.3d 1002, 1012-13 (D.C. Cir. 2010); *see also Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) ("[T]he availability of declaratory relief presupposes the existence of a judicially remedial right.").

This constitutional rule, at a minimum, counsels against holding that the President is subject to an implied cause of action in equity or a direct declaratory judgment when there is neither historical precedent nor express language supporting such a suit. Indeed, the Supreme Court has repeatedly held that, in light of these separation-of-powers concerns, an express statement is at the very least required before even a generally available cause of action may be extended specifically to the President. *See Franklin*, 505 U.S. at 801 (APA's express cause of action); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (*Bivens* and other implied causes of action for damages). That alone forecloses subjecting the President to suit here.

The district court's contrary reasoning is plainly erroneous. In the court's view (Add. 105), an injunction against the President would be proper because compliance with the Foreign Emoluments Clause is the type of mere "ministerial duty" that *Mississippi* suggested the President might permissibly be ordered to satisfy. 71 U.S. at 477. But a ministerial duty is one in "which nothing is left to discretion." *Id.* at 498. Here, by contrast, determining compliance with the Foreign Emoluments Clause requires ample "exercise of judgment." *Id.* at 499. It is immaterial that violating the Clause would be prohibited, because President Johnson in *Mississippi* likewise was prohibited from enforcing the statutes at issue if they were unconstitutional. *Id.* at 498. What matters is that President Trump must exercise judgment in determining whether his financial interests are compatible with the continued exercise of his office under the Emoluments Clauses, and thus his "performance of [that] official dut[y]" is not ministerial under *Mississippi*. *Id.* at 501.

b. Even assuming that individual Members of Congress could ever demonstrate Article III standing to sue to enforce institutional interests, legislators have no legally or judicially cognizable interests to sue to enforce the Foreign Emoluments Clause. The Supreme Court "has required that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quotation marks omitted); *see also Lexmark Int'l, Inc. v. Static Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining

that the zone-of-interests limitation on congressionally authorized causes of action is of "general application" and "applies unless it is expressly negated").

As the Members acknowledge, the Foreign Emoluments Clause is a prophylactic measure that aims to protect the public at large against the corrupting influence of foreign Emoluments on official actions. The Members, in bringing this suit, do not even allege any such corrupted action, let alone direct injury from any such corrupted action. Instead, they assert only an abstract interest in an alleged violation of the law by an official in the Executive Branch, cast as an infringement of their ability to consent to otherwise-prohibited Emoluments. They thus do not assert an interest that is even arguably protected under the Clause, but rather what is in essence only a generalized grievance, shared by all members of the public, in having an official comply with a prophylactic provision of the Constitution adopted for the benefit of the public generally. *United States v. Richardson*, 418 U.S. 166, 176-78 (1974). There is no basis in Article III or in the courts' equitable authority for such a suit.

C. The district court's Foreign Emoluments Clause holding was clearly and indisputably incorrect.

The district court was also clearly mistaken to hold that the Members have stated a claim under the Foreign Emoluments Clause, as properly construed. As the government explained, interpreting the Clause to prohibit only compensation accepted from a foreign government for services rendered by an officer in either an official capacity or employment-type relationship is supported by contemporaneous

dictionaries; by intra-textual comparison both within the Foreign Emoluments Clause itself and with the Domestic Emoluments Clause, U.S. Const. art. II, § 1, cl. 7, and the Incompatibility Clause, *id.* art. I, § 6, cl. 2; and by consistent Executive practice from the Founding era to modern times. Dkt. No. 15-1, at 18-41. But the district court rejected this well-supported interpretation and instead construed the term "broadly as any profit, gain, or advantage." Add. 95. This Court need not rely on that merits defect to grant this mandamus petition, given the threshold standing and cause-of-action defects. *Supra* p. 4. That said, the government stands ready to provide supplemental briefing on the merits if this Court so desires, as occurred in the parallel Fourth Circuit case. *In re Trump*, No. 18-2486 (4th Cir. Dec. 20, 2018) (inviting additional briefing); Reply Brief for Petitioner, *In re Trump*, No. 18-2486, at 15-22 (Feb. 21, 2019) (providing additional briefing).

II. MANDAMUS IS APPROPRIATE IN THIS EXTRAORDINARY CASE.

Because the district court's orders declining to dismiss this suit are clearly and indisputably incorrect, this Court should grant the petition if the President has "no other adequate means to attain relief" and the writ of mandamus is otherwise "appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81. Although an appeal from final judgment is ordinarily an adequate means of relief from the erroneous failure to dismiss a complaint, *see id.* at 381-82, that is not the case here given the unique and fundamental separation-of-powers concerns presented by allowing a suit to proceed and discovery to commence in a case against the President

in his official capacity that targets his private financial affairs because of the office he holds. The Supreme Court has repeatedly held that "[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Id.* at 385 (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Where the underlying suit is clearly and indisputably nonjusticiable (and meritless), it is not "adequate" to expose the President to suit and unwarranted and distracting discovery, and it is accordingly "appropriate" to provide mandamus relief to eliminate that "threat[] [to] the separation of powers." *Id.* at 380-81; *see also In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (per curiam) (mandamus appropriate when "the burden of discovery . . . could not be recompensed" by appeal of final judgment); *In re Papandreou*, 139 F.3d 247, 250-51 (D.C. Cir. 1998) (similar).

The district court has ignored the constitutional implications of proceeding with this litigation. In concluding that it was appropriate to commence discovery rather than certify an interlocutory appeal, the district court explained that an expedited discovery and summary-judgment schedule would provide the President with protection from the burdens of protracted litigation. Add. 113. But the fact that this suit is brought against the President "remove[s] this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise." *Cheney*, 542 U.S. at 381. As the Supreme Court has

explained, "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President." *Id.* at 382.

Those separation-of-powers concerns apply with force here. If the Members seek discovery against the President directly, that would inevitably "distract" the President "from the energetic performance of [his] constitutional duties." *Cheney*, 542 U.S. at 382. The Members' plan to target third parties to discover the President's personal financial information also poses severe separation-of-powers problems. As an end-run around the congressional subpoena process for seeking information if there is a legitimate legislative interest, the Members have initiated a meritless suit where they plainly lack standing and a cause of action in an effort to invoke the judicial discovery process. Allowing such a gambit would distract the President from the performance of his constitutional duties in similar ways as seeking discovery directly against the President. In both instances, whether intended or not, any information produced through discovery would undoubtedly be publicized and used to distract and harass the President. The Members cannot deny that obtaining such discovery for its own sake is a primary purpose of the suit. Indeed, below, the Members devoted the vast majority of their argument to opposing the government's motion for a stay of discovery pending interlocutory appeal, while opposing certification of the interlocutory appeal only in the final pages of their brief. *Compare* Dkt. No. 74, at 10-40 (opposing stay), *with id.* at 40-44 (opposing certification). The Members should not be permitted to use this (clearly and indisputably) flawed suit to

pry into the President's personal finances in such a manner. Because the district court refused to dismiss an "unwarranted impairment of another branch in the performance of its constitutional duties," this Court should step in to terminate this litigation now. *Cheney*, 542 U.S. at 390.[1]

Alternatively, if this Court were disinclined to grant mandamus to dismiss this suit, it should at the very least grant mandamus to order the district court to certify its motion-to-dismiss orders for interlocutory appeal. *See Fernandez-Roque v. Smith*, 671 F.2d 426, 431 (11th Cir. 1982). The sole reason that the district court gave for its refusal to certify was its view that further district-court proceedings could terminate this litigation faster than an appeal would. Add. 117. Again, though, that analysis entirely ignored *Cheney*'s teaching that "[s]pecial considerations applicable to the President" instruct that this Court "should be sensitive to requests by the Government for interlocutory appeals" such as this one. 542 U.S. at 391-92. Of course, the decision whether to grant certification under section 1292(b) is discretionary. But "[d]iscretion is not whim," *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016), and can be "clear[ly] abuse[d]," *Cheney*, 542 U.S. at 380. This is the rare case where the district court's exercise of discretion warrants mandamus

[1] The separation-of-powers concerns of the Executive Branch would be exacerbated if the Members also seek, as plaintiffs in parallel Emoluments suits have done, to inquire into the effect of alleged Emoluments on official actions of the President's administration, including through third-party subpoenas of government agencies.

relief, given that the legal standard for certification was plainly met and that the district court's reasoning to the contrary ignored important separation-of-powers concerns.

III. THIS COURT SHOULD STAY DISTRICT-COURT PROCEEDINGS PENDING ITS CONSIDERATION OF THIS PETITION.

This Court has previously granted stays of district-court proceedings pending disposition of a petition for a writ of mandamus. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756 (D.C. Cir. 2014); *In re Sealed Case No. 98-3077*, 151 F.3d at 1063. And the Fourth Circuit recently stayed district-court discovery in a parallel case brought by different plaintiffs against the President under the Foreign and Domestic Emoluments Clauses. *In re Trump*, No. 18-2486 (4th Cir. Dec. 20, 2018). A stay is likewise appropriate here. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (standard for stay pending appeal). As discussed above, the President is likely to obtain mandamus, and he is likely to suffer irreparable injury in the interim from the continuation of this suit and intrusive discovery into his personal finances based on the public office he holds. Plaintiffs have already sought discovery against thirty-seven third parties, demanding information including the tax returns of the Trump Organization and other entities. A response to those subpoenas is required by July 29, 2019.

No countervailing harm will result from the requested stay. Even setting aside that the Members' injuries are not cognizable at all, they do not come close to

outweighing the separation-of-powers concerns with this suit against the President in which the Members seek to pry into his personal finances on account of his office. Indeed, the Members have not sought and could not plausibly seek a preliminary injunction, which underscores that they face no immediate harm sufficient to outweigh the harm to the President. Nor can the Members explain how a suit such as this is a more appropriate vehicle to try to obtain the information they seek than the ordinary tools Congress possesses that do not rely on the judicial branch. The government thus requests that this Court promptly issue a stay of district court proceedings pending the Court's disposition of this petition.

CONCLUSION

The petition for a writ of mandamus should be granted. Additionally, this Court should stay district-court proceedings pending resolution of this petition. Because the subpoenas have a return date of July 29, 2019, the government respectfully requests that this Court act on the stay motion by July 22, 2019, in order to provide time to seek relief from the Supreme Court if necessary.

Respectfully submitted,

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